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Supreme Court of the United States

OCTOBER TERM, 1940

No. 160

RICHARD SMITH, GERALDINE J. HALL,
Petitioners and Appellants Below,

vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

MYRON G. EHRLICH,
CHARLES E. FORD,
JAMES K. HUGHES,
Counsel for Petitioners.

GIBSON BROTHERS, INC.

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THE UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The petition of Richard Smith and Geraldine J. Hall respectfully shows:

I.

Summary Statement of the Matter Involved.

Petitioners, together with one Rattley, were jointly indicted, tried and convicted by a jury in the District Court of the United States for the District of Columbia for violating Title 6, sections 151 and 151-A of the Code of Laws of the District of Columbia, as amended, and for conspiring to violate the same.

The indictment was in twelve counts. Counts 1, 3, 5, 7

and 9 charged the petitioners with operating a lottery. Counts 2, 4, 6, 8 and 10 charged the petitioners on the same days with selling a lottery ticket; count 11 charged the petitioners with possessing lottery tickets on the last date; and count 12 charged the petitioners with conspiring to do these same things.

The petitioners were acquitted on counts 1, 2, 3, 4, 5, 6, 7 and 8; and were convicted on counts 9, 10, 11, and 12. Petitioner Smith was sentenced on counts 9 and 10 to six months to two years and six months, on count 11 to six months and on count 12 to four months to two years, all counts to run concurrently. Petitioner Hall was sentenced on counts 9 and 10 to four months to ten months, on count 11 to four months, and on count 12 to four months to ten months, all counts to run concurrently.

Upon the *voire dire* at the request of the Government the Trial Court inquired of the panel seated in the jury box whether any of them had played the numbers game within two years of that date. Six jurors who answered in the affirmative were summarily, without further questioning, excused for cause. Petitioners assigned as error this action on the ground that prejudices and opinions relative to the crime itself do not form the basis for challenge for cause if the juror is otherwise able to render a fair and impartial verdict based on the evidence, the Court making no effort to ascertain this. The Government exercised eight additional peremptory challenges and petitioners ten. The statute (Title 6, Sec. 366, D. C. Code 1929) allows each side but ten. Petitioners aver that the error of the Trial Court allowed the Government fourteen peremptory challenges which are more than permitted by statute. (R. 25)

The Government produced evidence showing that on a number of occasions Ned Best, a police officer, placed a numbers bet with the said Rattley; that on these days, but several hours later and a few blocks away the said Rattley was observed by Best approaching a parked automobile

operated by petitioner Hall. Sometimes he entered the auto and sometimes he did not. Sometimes he handed her a paper bag and sometimes he did not. The contents of the bags on any of these occasions could not be determined. There was no evidence of any other number plays except those made by the policeman Best. (R. 29-40)

On some of these occasions the police officer followed Hall to the Town Tavern at the Peace Cross in Maryland. On one of these occasions, December 27, 1938, he observed her give a package to a colored man who gave it to a white man in a third car, the contents of which bag were unknown. (R. 37)

Police Officer George C. Deyoe testified that he observed this occurrence and that petitioner Smith was the recipient of the package plus 2 or 3 more from the colored man. The contents of all of these packages were unknown. (R. 50)

He further testified that on January 6, 1939 he swore to identical warrants of arrest for all defendants at the office of the United States Commissioner; there being no evidence as to any further observations by him in the interim. (R. 50)

On January 7, 1939 he gave witness Best certain marked coins; later that day in company with other officers and Deputy Marshal Ward, who possessed the warrant of arrest for petitioner Smith, he observed Hall drive to the Town Tavern and hand a package, contents unknown, to an unidentified person who shortly thereafter delivered it to petitioner Smith. Smith was followed and while in the District stopped at a stop sign. At this time Deputy Marshal Ward executed the warrant of arrest, placed Smith in custody and took over his automobile and the contents thereof. (R. 52)

While in custody, en route to Police Headquarters, Smith threw certain paper slips out of the window which were recovered. At Police Headquarters money and a pad were taken from his person. Over the objection and exception of petitioners the witness further described papers

taken from Smith's person and automobile as numbers slips and books. (R. 52)

Petitioner Hall was subsequently arrested pursuant to the said warrant of arrest; but nothing was taken from her person or automobile. (Rattley was similarly arrested and in his possession was found the marked coins. They were only offered in evidence against Rattley, and not petitioners.) (R. 59)

Petitioners objected to all of the evidence relative to the numbers plays, the delivery of packages, the search of Smith, the admission in evidence of all papers taken from his person and automobile and the testimony of the officers that they were numbers slips and books. Petitioners, when the warrants of arrest were offered in evidence, objected and moved to quash them. The Trial Court, over the objection and exception of petitioners, also admitted in evidence the warrants of arrest. (R. 60, 78)

Petitioners objections were twofold: (1) The warrants of arrest were invalid on their face in that neither they nor the supporting affidavits set forth any facts showing probable cause, and (2) the evidence of the Government was *uncontroverted that there was an absence of probable cause and a resulting violation of the Fourth Amendment.* (The Warrants of Arrest and the Supporting Affidavits are set forth in full on page 100 of the record.) (R. 61-63)

The Trial Court refused to pass upon the legality of the arrest, search or seizure on the authority of *James Bennett* and *Eula Mae Bennett* v. *United States,* 70 App. D. C. 76, 104 Fed. (2) 209, stating that such decision precluded it from considering during the trial the legality of the seizure of the various exhibits, no motion to suppress having been previously filed; to which ruling an exception was duly noted. The Court stated that in the past its practice was to permit counsel to either file a motion to suppress or object to the evidence as they in their discretion determined. (R. 102, 105)

During the course of the trial the Government attempted to explain the presence, at the time of the arrest of petitioner Smith, of Alcohol Tax Unit Inspector Sweeney and asked the question of a police officer why Sweeney was there (at the time of the arrest). Witness responded that Sweeney's car was in better shape than the police car and was used because they knew by reputation that petitioner was a right fast driver. (R. 88)

Petitioner moved the Trial Court to withdraw a juror on the ground that the Government cannot put in issue the character, reputation and habits of a defendant, nor introduce evidence thereto until so done by the defendant. The Court denied such motion and an exception was duly noted. (R. 88)

The Trial Court charged the jury that the failure of petitioners to testify was because they were availing themselves of a Constitutional right not to do so. The Court emphasized the law as to explanations of possession of numbers slips when there were no such issues in the case, and further commented on the failure of a member of a conspiracy from testifying, all of which resulted in an unfair comment on the failure of petitioners to testify. (R. 123, 124, 131)

From the judgment of conviction and the sentence thereupon, petitioners appealed to the United States Court of Appeals for the District of Columbia, that Court affirming the rulings of the Trial Court.

On appeal, the United States Court of Appeals in its written opinion held that it made no difference whether the release of the jurors was for cause or favor, even though it was upon challenge of the Government, thereby holding that the Government could exercise fourteen peremptory challenges in violation of the Statute if the jury as finally constituted was a fair and impartial one. (Last paragraph, page 2 of written opinion.) (R. 139)

It was urged in the Court of Appeals that this Honorable

Court had held in the cases of *Agnello* v. *United States,* 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145, and *Gouled* v. *United States,* 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647, that where the evidence is uncontroverted that there is a violation of the Fourth Amendment the objection may be raised to the evidence without the filing of a prior motion to suppress.

It was also urged that since it had been the practice of the Trial Court prior to this trial to permit an objection to the evidence to be made for the first time, its action in changing its practice afforded petitioners no opportunity to raise the question prior to trial.

The Court of Appeals refused to recognize the principles of *Agnello* v. *United States supra* and *Gouled* v. *United States, supra,* and without regard to the existence of facts showing an uncontroverted violation of the Fourth Amendment, summarily holds without even a reference thereto, that an objection to the evidence comes too late after the trial is in progress, which is directly repugnant to the law this Honorable Court has set forth. (R. 139)

The Court of Appeals, with the mere comment that no such showing has been made passes over petitioners' contention that they were afforded no opportunity to file a motion to suppress prior to the trial. (R. 139)

The Court of Appeals considered without sufficient merit to discuss, or refer to, petitioners' contention that it was error to permit a Government witness to testify to petitioner Smith' reputation for fast driving prior to his putting his character or reputation in issue, and more particularly when fast driving was entirely extraneous to any of the issues.

The Court of Appeals further wrote that petitioners' Counsel objected to the Trial Court, without their request instructing the jury not to draw unfavorable inferences from petitioners' failure to testify. In justice to counsel nowhere in the entire record do counsel assign or urge such charge as error. (R. 140)

As aforesaid, counsel objected to the unfavorable and prejudicial comments of the Court relative to "explanations of possession" when such issues did not exist, comments on the failure of a member of a conspiracy to testify and the right of a defendant not to testify.

II.

Reasons Relied on for Allowance of Writ.

1. That the United States Court of Appeals for the District of Columbia has decided a question of general importance relating to the construction of Title 6, Section 366 (1929) of the Code of Laws for the District of Columbia which has not been, but should be, decided by this Court.

2. a. That the United States Court of Appeals for the District of Columbia refused to follow the law set forth by this Court in *Agnello* v. *United States, supra* and *Gouled* v. *United States, supra,* and thereupon refused to extend to petitioners the rights under the Fourth Amendment this Court has stated they are entitled to.

b. That said Court failed to recognize petitioners' contentions that they were deprived of an opportunity to file a Motion to Supress prior to trial.

3. That the United States Court of Appeals affirmed a violation of petitioner Smith's Constitutional rights in sanctioning an attack on his reputation by the Government prior to his putting the same in issue.

4. That the United States Court of Appeals affirmed a violation of petitioners' constitutional rights in sanctioning a prejudicial charge to the jury.

WHEREFORE, your petitioners pray that the Writ of Certiorari issue under the Seal of this Court, directed to the United States Court of Appeals for the District of Columbia directing said Court to certify and send to this Court a full and complete transcript of the record and the pro-

ceedings of said Court of Appeals had in the case numbered on its docket 7447, *Richard Smith, Geraldine J. Hall,* Appellants v. *United States of America,* Appellee, to the end that this cause may be reviewed and determined by this Court; and for such other and further relief as to this Court may seem proper.

June 17, 1940.

RICHARD SMITH,
GERALDINE J. HALL,

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Council for Petitioners.